CHOO CHANG TEIK & ANOR.

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. YUSOF MOHAMED SCJ
EUSOFF CHIN J
[SC CRIMINAL APPEAL NO. 05-24, 25-89]
25 SEPTEMBER 1991

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Presumptions - Rebuttal - Drugs found in bathroom - Knowledge - Reason for running away - Control - Evidence by inference - Insufficient to base conviction - Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a).*

Both the appellants were charged for trafficking in heroin contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). A police party made a forced entry into a house and saw the 1st appellant C, walking towards the kitchen. It was alleged that on seeing them C ran away, but was arrested after a short chase. It was alleged that the 2nd appellant, T on seeing the police also attempted to run away but was arrested.

Another accused, TSH, who had since died in custody, was arrested in the master-bedroom. The drugs were subsequently recovered from the bathroom attached to the master bedroom.

In the High Court, the learned Judge called on both the appellants to enter their defence based on the presumptions under the Act as regards possession and control. The Judge rejected the defence of both the appellants namely that it was TSH who had borrowed the keys of the said house from T as TSH wanted to put something in the house, that all of them were tenants of the house and that C and T had no knowledge of the drugs.

The appellants had also adduced evidence through an independent witness, W (who was not challenged by the prosecution) who said that on the instructions of his late brother TSH, he had brought the travelling bag which contained the drugs from the family house and had left it in the said house at Kuala Lumpur. C also testified that he ran because he had been previously assaulted.

The evidence of the prosecution rested solely on the presence of the appellants in the house in which the drugs were found. One of the police officers testified that he saw C carrying something heavy from the boot of a car into the house but could not describe the object.

Held:

[1] The learned Judge had mistakenly relied on the presumption in s. 37(d) of the Act. However, such a mistake did not detract from established facts which *prima facie* constitute an offence under the Act, nor did such an error cause a miscarriage or failure of justice.

[2] On the evidence as a whole the defence raised by both the appellants were reasonable and probable and sufficient to rebut the presumptions under the Act. The prosecution evidence on the other hand had flaws in them. There is no other evidence to show that the offending drug was taken to the house by either of the appellants.

[3] The appellants had every reason to run away for their own safety when they were suddenly confronted by a police party in plainclothes and who were armed with rifles and guns.

[4] Although an adverse inference could be drawn against C for not producing any evidence to prove the assault on him 2 years ago, in relation to the present offence which carried a capital punishment, evidence by inference alone was not sufficient to base a conviction without some proof of the element of control.

[Appeals allowed.]

[Bahasa Malaysia translation of headnote]

PROSEDUR JENAYAH: *Mengedar dadah berbahaya -Anggapan - Penyangkalan - Dadah dijumpai di bilik mandi - Pengetahuan - Sebab mengapa tertuduh melarikan diri - Pengawalan - Kesimpulan - Tidak memadai untuk mensabitkan kesalahan - Akta Dadah Berbahaya 1952, ss.37(d), (da), 39B(1)(a).*

Kedua-dua perayu C dan T telah dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta tersebut). Apabila satu pasukan polis telah memecah masuk ke sebuah rumah, mereka melihat C menuju ke arah dapur. C telah melarikan diri, tetapi berjaya diberkas oleh polis. T juga telah cuba melarikan diri tetapi juga dapat diberkas oleh pihak polis.

TSH, seorang tertuduh (yang telah meninggal dunia semasa di dalam jagaan polis) telah diberkas semasa beliau berada di bilik tidur rumah tersebut. Dadah telah dijumpai di dalam bilik mandi bilik tidur tersebut.

Semasa perbicaraan di Mahkamah Tinggi, Hakim bijaksana mengarahkan kedua-dua tertuduh membela diri atas tuduhan berasaskan anggapan pemilikan dan pengawalan di bawah Akta tersebut. Hakim menolak pembelaan kedua-dua tertuduh yang memberi keterangan bahawa TSH telah meminjam kunci rumah tersebut untuk menyimpan barang di situ. C dan T memberi keterangan bahawa kesemua mereka menyewa bilik di rumah itu dan tidak tahu atau sedar mengenai dadah itu.

W, seorang saksi bebas, memberi keterangan (yang tidak dicabar oleh pendakwa) bahawa atas arahan TSH, dia telah bawa beg yang mengandungi dadah itu ke rumah tersebut. C juga berkata bahawa dia melarikan diri kerana dia pernah diserang.

Keterangan pihak pendakwa tertumpu kepada kehadiran kedua-dua perayu di dalam rumah tersebut. Seorang pegawai polis juga telah memberi keterangan bahawa beliau nampak C masuk ke rumah menjinjing sesuatu tetapi tidak dapat mengecam apa yang dijinjing.

Diputuskan:

[1] Hakim yang bijaksana telah membuat kesilapan apabila beliau menggunakan anggapan di bawah s. 37(d) Akta tersebut untuk menolak pembelaan tertuduh. Walau bagaimanapun kesilapan itu tidak mengurangi kesan bukti dari segi fakta yang (prima facie) mensabitkan kesalahan. Kesilapan itu juga tidak mengakibatkan salah laksana keadilan.

[2] Atas keterangan pada keseluruhannya, pembelaan kedua-dua perayu adalah munasabah dan boleh dipercayai dan memadai untuk menyangkal anggapan di bawah Akta tersebut. Keterangan pihak pendakwa mempunyai kecacatan. Tidak ada bukti yang menunjukkan bahawa dadah tersebut telah di bawa masuk ke rumah tersebut oleh perayu.

[3] Tindakan perayu melarikan diri adalah perbuatan yang munasabah memandangkan situasi di mana mereka telah diserbu oleh polis yang tidak berpakaian seragam dan membawa senjata.

[4] Walaupun anggapan melawan (adverse inference) boleh diambil kira terhadap C kerana beliau tidak mengemukakan keterangan mengenai serangan terhadapnya 2 tahun yang lepas, berkaitan dengan kesalahan dalam kes ini yang membawa hukuman mati, keterangan inferensi (evidence by inference) tidak mencukupi untuk mengakibatkan sabitan tanpa bukti pengawalan.

[Rayuan dibenarkan.]

Cases referred to:
Baharom v. PP [1960] 26 MLJ 249 ***(cons)***
Illian & Anor. v. PP [1988] 1 MLJ 421 ***(dist)***
R. v. Bland [1988] Crim LR 41 ***(cons)***
R. v. Abbott [1955] 2 All ER 899 ***(cons)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da), (g), 39B(1)(a)
Evidence Act 1950, s. 114illus.(g)

Other source referred to:
Commentary on s. 114 Law of Evidence in India by Woodroffe & Ameer Ali 13th Edn.

For the appellants - Christopher Fernando (S. Selvarajah with him); M/s. Fernandez & Co.
For the respondent - Kang Hwee Gee, DPP (Attorney-General's Chambers)

JUDGMENT

Mohd. Yusof Mohamed SCJ:

We allowed this appeal, set aside the conviction and sentence against both appellants and indicated that we would give our reasons later. We do so now.

Both the appellants, Choo Chang Teik (1st appellant), and Teoh Hee Siang (2nd appellant) were charged for trafficking in 6039.99 grammes of heroin contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952.

The facts of the case are that on 6 November 1985 a police party headed by Inspector Amarjit Singh kept surveillance on a house No. 12 Jalan Senohong Satu, Taman Cantik, Cheras, Kuala Lumpur. This was a double-storey house. At about 6 p.m. they saw two motorcars leaving the shopping area nearby. Both cars stopped at the house. One motorcar, a grey Datsun Stanza was driven by the 1st appellant and the other by one Tan Soon Hock with the 2nd appellant sitting beside him. As Tan Soon Hock and the 2nd appellant entered the house they saw the 1st appellant taking out something heavy from the boot of his motorcar and carrying it into the house.

At 6.15 p.m. the police party raided the house. They found the front door locked. Using a crowbar they broke open the door. On entering the house they saw the 1st appellant walking towards the kitchen. On seeing them the 1st appellant ran away. He was chased and was arrested some distance away from the house.

Another group of police officers rushed upstairs and they saw both the 2nd appellant and Tan Soon Hock in the master-bedroom. As they shouted "Police!" both of them ran towards the balcony and the 2nd appellant managed to jump out of the window. He was finally arrested also some distance away from the house. Tan Soon Hock was however arrested in the master-bedroom. Concealed in the bathroom attached to the master-bedroom, Insp. Amarjit Singh recovered a brown travelling bag which later was found to contain heroin.

Tan Soon Hock was consequently charged together with the appellants for the offence but as his fate determined it, he has since died in police custody just before the trial.

The prosecution also adduced evidence that the 1st appellant was present when the 2nd appellant rented the house from its agents and at different times Tan Soon Hock also participated in the negotiation on the rent payable for the house.

On these facts the learned Judge called on both the appellants to enter their defence. Obviously the presumptions under s. 37(da) and (g) of the Act had arisen in that both the appellants had possession and control of the heroin referred to in the charge and that they had the presumed knowledge of the existence of the drug in the house. The question which arose was whether both the appellants have rebutted those presumptions.

We agree with the learned Counsel for the appellants who pointed out that the learned Judge however had mistakenly relied on the presumption in s. 37(d) of the Act. But we do not agree that such a mistake detracted from established facts which *prima facie* constitute an offence under the Act, nor that such an error has caused a miscarriage or failure of justice.

Upon hearing the defence of both the appellants the learned Judge totally rejected them. We do not agree and hence allowed the appeal.

The defence story is that the 2nd appellant said that he and Tan Soon Hock had rented the house on 4 November 1985, meant for his office. He took the keys from its owner. He said that in the afternoon of 5 November 1985, Tan Soon Hock borrowed the keys from him saying that he wanted to put something in the house. He also said that on 6 November 1985, he met his old friend, that 1st appellant, while he was having lunch with Tan Soon Hock. His friend wanted to rent a room in the house to which he and Tan Soon Hock agreed. In the evening of 6 November they were moving into the house. They ordered some furniture for the house as evidenced by receipt produced bearing the same date, 6 November 1985, while the 1st appellant bought a pail, rubber hose and mops at the adjacent mini-market, for cleaning the house.

They were in the house for a short while when they heard a noise at the main door. The 1st appellant said that he was walking to the kitchen when suddenly he saw some people with crowbar and pistol in hand shouting at him. He ran away fearing that he might be assaulted. He said he did so because of his previous experience of being beaten by thugs at his friend's house at Johore Baru which left him disabled for about two years. They had injured his waist. He produced a certificate of his membership of handicapped persons' association to prove this contention.

The 2nd appellant on the other hand said that he was upstairs walking towards the room when he saw some people running up the stairs with iron rod and pistol in hands. He said that Tan Soon Hock shouted at him to run. When he did so he heard pistol shots behind him. Consequently, he jumped on top of a motorcar below and kept on running, he said, until he was arrested and brought back to the house. He denied any knowledge of the travelling bag recovered in the bathroom.

Both appellants also adduced evidence by an independent witness, Tan Soon Hoe, which was not challenged by the prosecution, who said that on instruction of his late brother Tan Soon Hock he had brought the travelling bag from the family house at Gurun, Kedah and had left it in the empty house at Kuala Lumpur.

We feel that on the evidence as a whole the defence raised by both the appellants are reasonable and probable and sufficient to rebut the presumption under the Act. The prosecution evidence on the other hand is not without flaws. ASP Manan's evidence was vague when he said that from his ambushed position across the road he had seen the 1st appellant carrying something heavy from the boot of his motorcar but could not describe the object although he maintained that his view was not obstructed. In this aspect of the case there is no other evidence to show that offending drug was taken to the house by either of the appellants.

The prosecution evidence against the 2nd appellant as to whether he had knowledge of the travelling bag in the toilet of the master-bedroom was equally doubtful. Insp. Amarjit Singh's evidence against him says that the 2nd appellant was standing at the entrance of the bedroom when the Inspector rushed up the stairs upon his entrance into the house.

On seeing him, he said, the 2nd appellant ran and jumped over the balcony when he fired five shots from his automatic rifle at the 2nd appellant. He also said that Detective Corporal Omar then rushed into the bedroom and arrested Tan Soon Hock. However, D/Cpl. Omar was not called to give evidence to say where the 2nd appellant was in relation to Tan Soon Hock at the time of his arrest.

On proper assessment of this evidence it is probable that both the appellants had no knowledge of the offending drugs in the travelling bag recovered from the toilet of the master-bedroom. The evidence shows that Tan Soon Hock was alone in the room when he was arrested.

The time lapse was only a few minutes after they were in the house when the police party forced their way into it. The 1st appellant was seen still walking towards the kitchen and the 2nd appellant was merely standing at the entrance of the master-bedroom when they were suddenly confronted by a police party not in uniform and armed with rifles and guns rushing at them; they had every reason to run away for their own safety.

We are not unmindful of the adverse inference drawn by the learned Judge under s. 114(g) of the Evidence Act 1950 against the 1st appellant because he had failed to call his witnesses to testify that he had been attacked by thugs two years before as reason for him to run away from the scene and hence the learned Judge ruled that the appellant by inference of fact had the necessary knowledge of the existence of the drugs in the house.

The Counsel on behalf of the 1st appellant objected to the inference drawn under s. 114(g) of the Evidence Act. He cited *Illian & Anor. v. PP* [1988] 1 MLJ 421 as his proposition that s. 114(g) of the Evidence Act cannot be invoked against an accused person nor can the failure of the accused to call any witness be made the subject of comment at a criminal trial. We do not agree and find that the facts in *Illian's* case are distinguishable.

In that case Illian was jointly charged with one Yu Kiat Ho in trafficking dangerous drugs on 19 November 1978 in Kangar, Perlis. In evidence both accused were seen handing the drug to a third person. In the confusion that followed both Illian and the third person escaped from the scene. He was however arrested later and charged jointly with Yu. Illian's defence was an alibi showing that as between 16 November 1978 and 20 November 1978 he was in Thailand. He produced a border pass to prove his alibi. The prosecution application to adduce evidence in rebuttal that the border pass was not genuine was refused by the learned Judge. At the end of the trial the learned Judge drew an adverse inference against Illian on his failure to call any witness to support his defence.

It is noteworthy that the present case differs from *Illian's*. Here, the prosecution had taken particular issue on the contention by the 1st appellant that he had been beaten two years before. Evidence in rebuttal was adduced by the prosecution showing that the 1st appellant had told some police officers during that period that he had a fall in his cell which caused his injury.

The distinction in the present case is that upon rebuttal evidence having been adduced, the law has cast the burden on the 1st appellant to prove his own contention by the evidence of his friend at whose house he was seen beaten. When he failed to offer such proof the natural conclusion is that the proof if produced instead of rebutting would sustain the charge.

In this view we are in agreement with the learned Judge that an adverse inference can be drawn against the 1st appellant in the present situation when a complete case has been made out against the 1st appellant and the case disclosed that there is evidence which could be produced by the appellant to negate the charge against him - see *Commentary on s. 114 Law of Evidence in India* by Woodroffe & Ameer Ali 13th Edn. at 2656.

Our view is fortified by the decision in *Baharom v. PP* [1960] 26 MLJ 249. In that case the accused was convicted and sentenced to death for murder. He raised insanity as a defence. At one stage or another the defence knew that the Principal Officer, Pudu Jail, the Medical Officer i/c of Prison and the Medical Superintendent, Tanjong Rambutan were in a position to give evidence if called upon as to the accused's state of mind. The defence did not produce any of those witnesses. The learned trial Judge expressed his opinion when directing the jury that he could find no evidence of insanity.

On appeal on the point that the trial Judge had misdirected the jury, Thomson CJ said at 250:

> ... it was for the defence to call that evidence and if they did not do so the jury might safely draw the unfavourable inference provided for by s. 114(g) of the Evidence Ordinance, that is to say that if called it would be unfavourable to the accused.
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> ... in such a case, there is an onus on the defence, that is to prove that the accused was insane.

Be that as it may, we feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone was not sufficient to base a conviction of the appellant without some proof of element of control.

In *R. v. Bland* [1988] Crim. LR 41 the appellant there was charged with possession of a controlled drug with intent to supply. The prosecution case against her relied solely on the fact that she was living with Ratcliff at a time when he had undoubtedly dealt in drugs. At the close of the prosecution case, Counsel for the appellant submitted that there was no evidence to go before the jury. However, Counsel for the Crown submitted that it was open to the jury to find that the appellant knew what Ratcliff was doing and that she had acted, not as principal, but as one who had lent passive assistance. The recorder rejected the defence submission, the appellant was convicted and appealed against conviction. In allowing the appeal the JJ of the Court of Appeal Criminal Division held that:

> The fact that the appellant and Ratcliff lived together in the same room was not sufficient evidence from which the jury could draw such an inference. There was sufficient evidence from which the jury could have inferred knowledge on the appellant's part that Ratcliff was drug-dealing, but no more. Assistance, though passive, required more than mere knowledge; for example, it required evidence of encouragement at least, or of some element of control, which was entirely lacking in the case. The case should have been withdrawn from the jury.

The onus of proving a criminal charge against both appellants in a joint trial always lies with the prosecution. In *R. v. Abbott* [1955] 2 All ER it was held that:

> If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty.

In the present case we are of the view that although it is unfortunate that a guilty party cannot be brought to justice, it is more important that there should not be a miscarriage of justice and the law should be maintained that the prosecution should prove its case.

Also found at [1991] 3 CLJ 2387